

APPEAL NO. 040564
FILED APRIL 29, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A consolidated contested case hearing (CCH) was held on February 2, 2004. The hearing officer determined in Docket No. 1 that: (1) the appellant's (claimant) compensable injury of (date of injury for Docket No. 1), extends to and includes bilateral shoulder strain, cervical strain, and bilateral carpal tunnel syndrome (CTS); and (2) the respondent (carrier) did not waive the right to contest the extent of injury, because there is no requirement under the 1989 Act or Texas Workers' Compensation Commission (Commission) rules for the carrier to contest extent of injury within a certain period when the carrier has accepted liability for a compensable injury. The hearing officer determined in Docket No. 2 that: (1) the claimant did not sustain a compensable injury on (date of injury for Docket No. 2); and (2) the claimant timely notified the employer of the claimed injury of (date of injury for Docket No. 2). The claimant appealed all of the hearing officer's determinations based on sufficiency of the evidence grounds. The carrier responded arguing that the claimant's appeal is untimely.

DECISION

We reform Conclusion of Law No. 2 to correct a typographical error. We reverse and render in part, and affirm in part.

JURISDICTION

We first address the question of the timeliness of the claimant's appeal. A written request for appeal must be filed within 15 days of the date of receipt of the hearing officer's decision, excluding Saturdays, Sundays, and holidays listed in Section 662.003 of the Texas Government Code. Section 410.202(a) and (d). Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § Rule 143.3(c) (Rule 143.3(c)) provides that an appeal is presumed to have been timely filed if it is mailed not later than the 15th day after the date of receipt of the hearing officer's decision and received by the Commission not later than the 20th day after the date of receipt of the hearing officer's decision. Both portions of Rule 143.3(c) must be satisfied in order for an appeal to be timely. Texas Workers' Compensation Commission Appeal No. 002806, decided January 17, 2001. Commission records indicate that the hearing officer's decision was mailed to the parties on February 10, 2004. The claimant stated in her appeal that she received the hearing officer's decision on February 11, 2004. In accordance with amended Section 410.202, the appeal needed to be mailed no later than March 5, 2004, and received no later than March 12, 2004. The claimant's appeal was postmarked March 5, 2004, and received by the Chief Clerk of Proceedings on March 12, 2004; thus, the appeal is timely.

TYPOGRAPHICAL ERROR

We note that Conclusion of Law No. 2 contains a typographical error as to the date of the compensable injury. We reform Conclusion of Law No. 2 to correct the typographical error and conform to the hearing officer's Finding of Fact Nos. 1(D), 4 and 5, and the Decision and Order. The correct date of the compensable injury is (date of injury for Docket No. 1).

FACTUAL STATEMENT

The parties stipulated that the claimant sustained a compensable injury on (date of injury for Docket No. 1). The claimant, a home health aide, testified that while helping a client bathe, she slipped and fell landing on her right side and that the client fell out of the wheelchair onto the claimant. The claimant testified that she injured her right shoulder and back. A medical report dated (date of injury for Docket No. 1), reflects in the "Diagnosis Information" section that the claimant was diagnosed with "Back Contusion," "Back Pain," "Back Strain," "Cervical Strain," "Coccyx Sprain," "Lumbar Pain," "Lumbar Strain," "Sacrum Strain," "Shoulder Strain L/R," "Thoracic Spine Pain," "Thoracic Strain"; and, in the "Other Diagnosis" section the claimant was diagnosed with "Lower back pain" and "hip/shoulder contusion." The claimant underwent treatment for her right shoulder and back injuries. The report of the required medical examination doctor, Dr. P, dated April 1, 2003, reflects that Dr. P reviewed the medical records and opined that the claimant "suffered a strain/contusion to the right shoulder and lumbar spine as the result of the fall of (date of injury for Docket No. 1)." In addition, Dr. P states in his report that the claimant had "electrodiagnostic studies on 12/31/02, which were suggestive of [CTS] but without evidence of radiculopathy." The claimant testified that she filed a claim for the CTS with a date of injury of (date of injury for Docket No. 2); however, the claimant contends that the CTS is related to her injury of (date of injury for Docket No. 1). With regard to the claimed injury of (date of injury for Docket No. 1), a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) reflects that the carrier first received written notice of the injury on December 17, 2002, and that it disputed compensability of the claimed injury on April 25, 2003, when it filed the TWCC-21. It is undisputed that the carrier waived the right to contest the compensability of the claimed injury of (date of injury for Docket No. 1). With regard to the claimed injury of (date of injury for Docket No. 2), a TWCC-21 reflects that the carrier first received written notice of the injury on May 1, 2003, and it disputed compensability of the claimed injury on May 2, 2003.

DOCKET NO. 1 EXTENT OF INJURY/CARRIER WAIVER

With regard to Docket No. 1, the issues before the hearing officer were whether the compensable injury of (date of injury for Docket No. 1), includes bilateral shoulder strain, cervical strain and bilateral CTS, and whether the carrier waived the right to contest compensability by not timely contesting compensability. The carrier contended that it did not waive its right to dispute the claimant's bilateral shoulder strain, cervical

strain, and bilateral CTS, asserting that this presented an extent-of-injury issue, not a waiver issue. Rule 124.3(c) provides that Section 409.021, regarding the initiation of benefits and carrier waiver, does not apply to “extent of injury” disputes. Notwithstanding, we have said that that rule cannot be interpreted in a way that would allow a dilatory carrier to recast the primary claimed injury issue as an “extent issue” and thereby avoid the mandates of Section 409.021. See Texas Workers’ Compensation Commission Appeal No. 022454, decided November 18, 2002; Texas Workers’ Compensation Commission Appeal No. 021907, decided September 16, 2002; Texas Workers’ Compensation Commission Appeal No. 021569, decided August 12, 2002; and Texas Workers’ Compensation Commission Appeal No. 022183, decided October 9, 2002. It is clear from the medical evidence in the record that the carrier was fully apprised of the bilateral shoulder strain and cervical strain as conditions that the claimant was asserting as the original compensable injury. As such, the carrier was obligated to dispute the compensability of the claimed bilateral shoulder strain and the cervical strain injuries in accordance with Section 409.021. The carrier failed to do this. Since the carrier waived the right to contest compensability of the injury, the claimant’s primary claimed injury of bilateral shoulder strain and cervical strain became compensable as a matter of law.

With regard to the bilateral CTS, the hearing officer determined that the claimant’s compensable injury of (date of injury for Docket No. 1), extends to and include bilateral CTS. Extent of injury is a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). In view of the evidence presented, we cannot conclude that the hearing officer’s extent-of-injury determination regarding bilateral CTS is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The evidence supports the hearing officer’s determination that “[t]he compensable injury of (date of injury for Docket No. 1), extends to and includes bilateral shoulder strain, cervical strain, and bilateral [CTS].” However, given that the carrier failed to dispute the compensability of the claimed injury, the claimant’s bilateral shoulder strain and cervical strain also became compensable as a matter of law. Accordingly, we reverse the hearing officer’s determination that the carrier did not waive the right to contest the extent of injury and render a new decision that the carrier waived the right to contest the bilateral shoulder strain and cervical strain, but that the carrier did not waive the right to contest the bilateral CTS.

The medical evidence supports the hearing officer’s determination that the claimant’s compensable injury of (date of injury for Docket No. 1), extends to include bilateral CTS. Accordingly, we affirm the hearing officer’s extent-of-injury determination, as it pertains to bilateral CTS.

DOCKET NO. 2
INJURY/TIMELY NOTICE

With regard to Docket No. 2, the issues before the hearing officer were whether the claimant sustained a compensable injury on (date of injury for Docket No. 2), and whether the claimant timely notified the employer of the alleged (date of injury for Docket No. 2) injury, and if not, whether the claimant had good cause for not timely notifying the employer. The hearing officer's ultimate resolution of these issues amounts to findings that are in favor of the claimant; therefore, the claimant was not aggrieved by the hearing officer's decisions.

OTHER MATTERS

Finally, the claimant in her appeal requests that the Appeals Panel "find that I am...disabled due to this injured body part." The issue of disability was not a certified issue at the CCH, nor was it actually litigated. The Appeals Panel will not consider the request for the first time on appeal.

The hearing officer's decision and order, as reformed, is reversed and rendered, as set forth above, in part, and affirmed in part.

The true corporate name of the insurance carrier is **EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY** and the name and address of its registered agent for service of process is

RICK KNIGHT
105 DECKER COURT, SUITE 600
IRVING, TEXAS 75062.

Veronica L. Ruberto
Appeals Judge

CONCUR:

Margaret L. Turner
Appeals Judge

Edward Vilano
Appeals Judge